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No. 85-1695

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In The
Supreme Court of the United States
October Term, 1986

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**SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISME,**

Petitioners,

v.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,**

Respondent.

**(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties In Interest)**

— 0 —
**On Writ of Certiorari To The United States
Court of Appeals For The Eighth Circuit**

— 0 —
**BRIEF FOR RESPONDENT
AND REAL PARTIES IN INTEREST**
— 0 —

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October 8, 1986

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QUESTIONS PRESENTED

1. Whether the Hague Convention is applicable to the discovery of documentary evidence and information located abroad from a foreign national over whom a United States court has personal jurisdiction.

2. Whether the Hague Convention supplants the application of the discovery provisions of the Federal Rules of Civil Procedure when discovery of documentary evidence and information located abroad is sought from a foreign national over whom a U.S. court has jurisdiction.

3. Whether international comity requires the application of the Hague Convention in this case.

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**BRIEF FOR RESPONDENT
AND REAL PARTIES IN INTEREST**

Respondent United States District Court for the Southern District of Iowa together with Dennis Jones and John and Rosa George, real parties in interest, respectfully submit this brief on the merits.

STATEMENT

The Petitioners are corporations owned by the Republic of France which design, manufacture and market aircraft. (Pet. App. 1a). Although they design and manu-

facture their aircraft in France, they advertise and sell them in the United States. (*Ibid*). On August 19, 1980, an aircraft sold by Petitioners crashed in New Virginia, Iowa. (*Ibid*). John George, a passenger, and Dennis Jones, pilot-in-command, were injured in the crash. As a result of this crash, Dennis Jones, John George, and Rosa George (collectively "Plaintiffs") instituted actions, founded in negligence, defective products liability and breach of warranty, for damages against the Petitioners. (*Ibid*). The actions were consolidated in the United States District Court for the Southern District of Iowa. (*Ibid*). Upon the parties' consent, the district court referred the actions to a magistrate in accordance with 28 U.S.C. § 636 (c)(1). (*Ibid*).

In August 1983, Plaintiffs served the Petitioners with an initial request for production of documents; this request sought the flight manual, pilot's handbook, performance data and testing records of the aircraft involved in the crash. (J.A. A19-A20). In December 1983, Petitioners furnished to Plaintiffs copies of the Type Certificate and type certificate data for the aircraft. (Pet. App. 12a). In May 1984, Petitioners supplied Plaintiffs with a copy of the flight manual. Plaintiffs served a second request for production in April 1984 seeking reports and design specifications for the aircraft. (J.A. A27-A29). A set of interrogatories and requests for admissions were served upon the Petitioners in April 1985, and a second set of requests for admissions in June 1985. (J.A. A21-A26; J.A. A30-A38). These requests for admissions and interrogatories were limited in scope to certain claims about the aircraft contained in advertisements published in United States aviation magazines.

Petitioners declined to comply with this second discovery request, and sought a protective order from the magistrate. (Pet. App. 12a; J.A. A1-A11). Petitioners contended that the responsive information and documents could properly be produced only through the procedures set forth by the Hague Evidence Convention.¹ Petitioners

¹ 23 U.S.T. 2555, TIAS No. 7444. The Hague Evidence Convention is also set forth in 28 U.S.C.A. § 1781 (1986 Supp.); VII Martindale-Hubbell Law Directory, Part VII, at 12-14 (1986); 1 B. Ristau, International Judicial Assistance (Civil and Commercial) at DS-50-DS-63 (1984); Pet. App. at 26a-41a.

"The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides three methods of obtaining evidence abroad: by a letter rogatory, requesting authorities and a signatory state to obtain evidence or to perform some other judicial act to obtain evidence; by notice to appear before an American consulate officer or foreign officer; or by designation of a private commissioner. The Hague Convention, 23 U.S.T. 2555, TIAS No. 7444. Under the letter rogatory method, the letter of request is transmitted to the central authority of the foreign state and must specify:

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Other information as needed must also be specified, according to Article 3. 23 U.S.T. 2558-59. Letters of Request must be in the language of the authority requested to execute it or be accompanied by a translation into that language. Art. 4. France has made an authorization pursuant to

(Continued on following page)

also argued that production by means other than the Convention would violate a French "Blocking Statute" prohibiting the transmittal of evidence for use in foreign judicial proceedings except as provided by international agreement or French law. (J.A. A9-A10).²

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Art. 33, providing that it will execute only letters in French, or accompanied by a translation in French. 28 U.S.C.A. §§ 1635-1960, 1984 pocket part, p. 90. Pet. App. 12a-13a.

The Convention was ratified by the United States in 1970 and entered into force in 1972. Ristau, *supra* at DS-101. The Convention was ratified and entered into force by France in 1974. Ristau, *supra* at DS-75. France also declared under Art. 23 of the Convention that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known common-law countries, will not be executed. Ristau, *ibid*.

² Law No. 80-538, [1980] Journal Officiel 1799; (Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons). Ristau, *supra* Vol. 2 at CI-72; Pet. App. 47a-51a. The relevant portions of the French Blocking Statute provide as follows:

Article 1—*bis*—Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

* * *

Article 2—The persons affected by article 1 and 1A must inform, without delay, the Minister in charge whenever they are requested in any manner to provide such information.

* * *

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In addition to responding to the first request for production, Petitioner responded to the first and second sets of requests for admissions in October 1985. Petitioners participated, under the Federal Rules of Civil Procedure, in the deposition of Plaintiff John George. Petitioners also availed themselves of the Federal Rules of Civil Procedure in serving upon Plaintiffs two sets of interrogatories and a request for production. Plaintiffs answered the interrogatories and furnished the requested documents.

The district court denied Petitioners' Motion for Protective Order and ordered compliance with Plaintiffs' discovery requests. (Pet. App. 11a-25a). The Magistrate, after balancing the competing interests, based his decision primarily upon his "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts, and the potential interference with such proceedings which forced compliance with foreign court procedures would cause." (*Id.* at 24a). In response to Petitioners' claim that discovery would violate the French Blocking Statute, the Magistrate cited evidence that the provisions of the statute "have not been strictly enforced in France" and that "a party who is affected by the law, may seek a waiver of its provisions from the appropriate French minister". (*Id.* at 22a). The court also found that the discovery sought—produc-

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Article 3—Without prejudice to heavier sanctions stipulated by the law, any infraction to the present law Articles 1 and 1A provisions will be punished with two months to six months imprisonment and with a 10,000 to 120,000 French francs fine or any one of these two penalties only. Pet. App. 7a-8a.

tion of documents, responses for requests for admissions, and answers to interrogatories—"does not have to take place in France" and that the requested discovery was "not greatly intrusive or abusive". (*Id.* at 24a & 25a). The court concluded that it was dealing "with a conflict between two essentially equal federal laws. To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from the use of such products." (*Id.* at 25a). The court then ordered discovery as follows:

1. Defendant shall answer the interrogatories propounded by Plaintiffs and respond to Plaintiffs' request for admissions and for production of documents on or before October 1, 1985.
2. If discovery depositions are to be undertaken, *the court will require compliance with the Hague Evidence Convention if such depositions are to be conducted in France*, based on the court's understanding of the current law. (*Ibid.*) (emphasis added).

Petitioners then sought review of the Magistrate's decision through a Petition to the Eighth Circuit Court of Appeals for a Writ of Mandamus. (*Id.* at 1-19). The Court of Appeals considered the Petition on the merits, and after doing so, denied the Petition for Writ of Mandamus. (*Id.* at 1a-10a). While recognizing that a minority of courts have adopted the position advanced by the Petitioners, it was the opinion of the Court of Appeals that:

the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant, the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. (*Id.* at 4a).

The Eighth Circuit specifically adopted the Fifth Circuit's view that:

matters preparatory to compliance with the discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention.

(*Id.* at 5a, quoting *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. July 17, 1985) (No. 85-98)). The court concluded that "[t]he discovery sought in this case neither intrudes on nor threatens French judicial sovereignty or custom." (*Ibid.*). The court found that:

the Magistrate's order did not require any foreign attorneys to appear in France to conduct discovery procedures that are typically considered a judicial function by France and other civil law countries. The order simply requires the Petitioners, who are parties subject to the jurisdiction of the United States court, to perform certain acts preparatory to the production of documents and information in the United States. These acts do not require any French judicial participation. (*Ibid.*).

The court then concluded that:

The Hague Convention does not apply to the discovery sought in this case "because the proceedings are in a United States court, involve only parties subject

to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad." *Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), [order granting cert. vacated, 106 S.Ct. 2887, 90 L.Ed.2d 975 (U.S., Jun 9, 1986) (No. 85-99)]. (*Ibid*).

In finding the Hague Convention to be justified by other consideration, the court further concluded that:

The Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign non-parties who are not subject to an American court's jurisdiction and compulsory powers. (*Id.* at 6a).

The Eighth Circuit Court of Appeals next considered Petitioners' contention that principles of international comity require that the Plaintiffs first attempt discovery through the Hague Convention procedures, and only if their discovery efforts prove futile, the Plaintiffs may then rely on the discovery procedures in the Federal Rules of Civil Procedure. The court agreed with the Fifth Circuit in *Ansuetz* that:

The greatest insult to a civil country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure. (*Id.* at 7a) (Citing *Ansuetz*, 754 F.2d at 613).

The court believed that such a policy would defeat rather than promote international comity. (*Ibid*).

The court next considered Petitioners' argument that they should not be required to comply with the Magistrate's discovery order, because to do so would subject them to potential criminal liability under the French Block-

ing Statute. After carefully reviewing the Magistrate's analysis of the competing national interests, relying on the factors set forth in the Restatement (Second) Foreign Relations Law of the United States § 40 (1965), the court concluded that the district court properly ordered the Petitioners to comply with Plaintiffs' discovery requests. (*Id.* at 9a). The court suggested that Petitioners, as corporations owned by the Republic of France, "stand in a most advantageous position to receive a waiver" of the Blocking Statute's requirements. (*Id.* at 10a). This issue would only be relevant should Petitioners fail to comply with the Magistrate's discovery order, and Plaintiffs sought to impose sanctions. (*Id.* at 9a-10a). No question of sanctions under Federal Rule of Civil Procedure 37 is before the Court at this time.

—o—

SUMMARY OF ARGUMENT

Discovery of relevant documents and information is critical in any case, but particularly so in a defective products liability case. Without just, speedy and inexpensive discovery, the courthouse is effectively barred to those who so desperately need it—United States citizens injured by defective foreign products. With these fundamental principles in mind, the Court of Appeals properly held that the Hague Convention procedures are not applicable to the limited discovery requested by Plaintiffs in this case.

The discovery sought by Plaintiffs in this case is limited to interrogatories, requests for production, and requests for admissions. This discovery will not take place

on French soil, nor will it infringe upon France's sovereignty. In such cases, the Hague Convention is inapplicable and not superior to the Federal Rules of Civil Procedure.

Well reasoned judicial authority, as well as a study of the language and history of the Hague Convention, find that the Hague Convention is not exclusive nor meant to supplant the Federal Rules of Civil Procedure for parties subject to *in personam* jurisdiction of American courts. The Hague Convention supplements the Federal Rules of Civil Procedure.

To require the Plaintiffs in this case to first resort to the Hague Convention procedure, will be a costly, burdensome and time-delaying exercise in futility. France's hostility towards American discovery practices is well known and clearly evidenced by its "Catch-22" maneuvers. It has decreed, under Article 23 of the Hague Convention, that it will not honor Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries. After adopting the Convention, France then unilaterally enacted a law that prohibits, under the threat of criminal penalty, French nationals from disclosing any information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith. The result is that injured Americans are effectively barred from obtaining meaningful discovery of French nationals who are parties before American courts. To argue that these Plaintiffs, if unsatisfied with any results under Hague convention procedures may ultimately resort to the Federal Rules of Civil Procedure, is specious. Addi-

tional proceedings before the court will be necessary, as well as probable further appeals with their attendant cost and delay—all to the prejudice of these Plaintiffs in this case, which is already some years old. The greatest insult to a civil law country's sovereignty would be for American courts to invoke a foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure.

The Petitioners have enjoyed all the benefits of marketing their products in the United States. They have taken advantage of the benefits of the Federal Rules of Civil Procedure in this litigation. To bar the Plaintiffs from these same benefits puts the Petitioners at an unfair and unjust advantage. The requested discovery does not infringe upon any vital French interests, nor its courts' sovereignty. Under the circumstances of this case, an abstract claim of "judicial sovereignty" cannot equate to a right—indeed, it would be an extraordinary privilege—to have all of the benefits of access to American markets, yet to be free from the burdens that American judicial procedures generally impose. Forced application of the Hague Convention procedures in this case defeats the vital United States' interest in assuring that all litigants proceeding before them are treated equally and fairly. Another vital national interest in this case is the protection of United States citizens from harmful foreign products and compensation for injuries caused by such products. Even under the principles of international comity, application of the Hague Convention is not warranted.

While not bound to apply a comity analysis to this case, the district court, in doing so, reached the proper

conclusion that the Hague Convention did not apply to Plaintiffs' requested discovery in this case. Accordingly, the order of the Court of Appeals should be affirmed.

ARGUMENT

I.

THE HAGUE EVIDENCE CONVENTION HAS NO APPLICATION TO THE LIMITED DISCOVERY SOUGHT IN THIS CASE

A. The Limited Discovery Sought by Plaintiffs Will Not "Take Place" Within France

The discovery sought by Plaintiffs is limited to answers to interrogatories, responses to requests for admissions, and production of documents. Plaintiffs have not requested the depositions of any French nationals, nor have Plaintiffs requested that they inspect any materials upon French soil.³

As its title implies, the Hague Evidence Convention governs the taking of evidence *abroad*.⁴ The Hague Convention has no application at all to the production of evidence in this country by a party subject to *in personam* jurisdiction of a district court pursuant to the Federal

³ Plaintiffs have no disagreement with the Magistrate's order that requires compliance with the Hague Evidence Convention if discovery depositions are to be conducted in France.

⁴ The title of the Convention itself states: "Convention on the Taking of Evidence Abroad in Civil or Commercial Matters". (emphasis added) Pet. App. 26a.

Rules of Civil Procedure. *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 615 (5th Cir. 1985).⁵ The discovery requested by Plaintiffs does not "take place" within France's borders merely because documents to be produced in the United States are located in France. Similarly, discovery should be considered as taking place here, not in France, when interrogatories or requests for admissions are served here, even if the necessary information is located in France. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).⁶

⁵ See e.g. *Societe Nationale Industrielle Aerospatiale v. United States District Court for the District of Alaska*, 788 F.2d 1408, 1410 (9th Cir. 1986); *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729 (5th Cir. 1985); *Lowrance v. Michael Weinig, GmbH and Co.*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985). It is noted that it has been held that the Hague Convention does not apply at all to the discovery of evidence available in the United States. *International Society of Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 443-44 (S.D.N.Y. 1984). No doubt some of the information and documents requested by Plaintiffs are located in the United States, at least with regard to the Petitioners' advertisements that appear in aviation magazines published in the United States. Although Petitioners claim (Pet. Br. p.13) that they maintain no corporate offices, manufacturing plants or service facilities in the United States, the fact is that they, or their American affiliates, are currently doing business and maintain offices in the United States. See *Aerospatiale* advertisement appearing in 113 *Flying* at pp. 62-63 (June 1986).

⁶ This proposition has been adopted by numerous courts including, *SNIAS*, 788 F.2d at 1410-11; *Messerschmitt*, 757 F.2d at 731; *Anschuetz*, 754 F.2d at 611; *Lowrance*, 107 F.R.D. at 389; *Work v. Bier*, 106 F.R.D. 45, 51-52 (D.D.C. 1985); *Krishna*, 105 F.R.D. at 448.

B. The Limited Discovery Sought by Plaintiffs Does Not Intrude Upon French Sovereignty

While the principles of international comity are not applicable to determine whether or not the Hague Convention should be applied to this discovery, the district court, in applying a comity analysis, correctly required Petitioners to answer the interrogatories propounded by Plaintiffs, and to respond to the request for admissions and production of documents under the Federal Rules of Civil Procedure. (Pet. App. 25a). The district court balanced France's interest in controlling its judicial system against the American interest in full pretrial discovery. The intrusion on French sovereignty is minimal, because no proceedings will place on French soil. *SNIAS*, 788 F.2d at 1411.⁷ Petitioners are required only to select the relevant documents in France. Such action is preparatory and does not require participation of the French government. *SNIAS*, 788 F.2d at 1411.⁸ The discovery requested by plaintiffs will not require American lawyers to conduct discovery in France, traditionally a judicial function in their system of jurisprudence.

The Hague Convention clearly does not govern Plaintiffs' limited discovery requests which do not require the "taking of evidence abroad". The principles of international comity do not apply to this discovery, but even if a comity analysis is used, the Convention procedures are not mandated.

⁷ Citing *Messerschmitt*, 757 F.2d at 732. See e.g. *Krishna*, 105 F.R.D. at 447; and *Graco*, 101 F.R.D. at 520-21.

⁸ Citing *Anschuetz*, 754 F.2d at 611.

II.

THE HAGUE EVIDENCE CONVENTION DOES NOT SUPPLANT THE APPLICATION OF THE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE TO FOREIGN NATIONALS SUBJECT TO IN PERSONAM JURISDICTION IN UNITED STATES COURTS

A. The Greater Weight of Reasoned Authority Holds the Hague Evidence Convention to be Non-Exclusive.

No federal court has found the provisions of the Hague Convention to be exclusive or mandatory. *SNIAS*, 788 F.2d at 1410.⁹ The United States supports the position that the Convention, based upon its language, history

⁹ Citing *Anschuetz*, 754 F.2d at 606, n.7; *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 27 (S.D.N.Y. 1984). Some of the Courts finding that the Hague Convention is not to be the exclusive means of acquiring evidence from a foreign party are: *Lowrance*, 107 F.R.D. at 388; *Work*, 106 F.R.D. at 48 & 53; *Slauenwhite v. Bekum Maschinenfabriken, GmbH*, 104 F.R.D. 616, 618-19 (D. Mass. 1985). ("In sum, the treaty does not prohibit the taking of discovery in this country from foreign corporations over whom the Court has personal jurisdiction. Nor does it require an initial resort to the procedures of the Convention. This is perhaps no more than a corollary to the proposition that when a corporation 'purposely avails itself of the privilege of conducting activities with the forum State,' it has clear notice that it is subject to suit there. [citations omitted] Providing discovery is one of the aspects of being 'subject to suit' in this country"); *Krishna*, 105 F.R.D. at 446; *Compagnie*, 105 F.R.D. at 27; *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48 (D.D.C. 1984); *Graco*, 101 F.R.D. at 517; *Murphy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984); *Philadelphia Gear Corp. v. American Plauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,223 (1983).

and purposes, is not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence.¹⁰ The government of the United Kingdom, a Hague Convention signatory, agrees with the Court below that the Hague Convention does not provide the exclusive and mandatory means for obtaining documents and information located in another signatory state.¹¹ Even Petitioners recognize that the United States courts retain their power under the Federal Rules to compel discovery, to draw adverse inferences from their failure to produce evidence, or to impose other sanctions. (Pet. Br. 35; Pet. Reply Br. 5).

B. The Language and Negotiating History of the Hague Evidence Convention Indicates that it is Not the Exclusive Method for Obtaining Discovery Abroad.

The Convention text does not state that it is the exclusive means for obtaining discovery abroad. There is no express language in any way indicating that the Convention "must" or "shall" be employed to obtain all evidence in a signatory forum country. More importantly, it does not even intimate that it will supplant the internal laws or procedures of a forum state, like the United States, when the forum state has jurisdiction over the party who had control of the evidence located abroad.

The preamble to the Convention states that its purpose is to "facilitate" the transmission and execution of

¹⁰ Brief of Solicitor General as amicus curiae at 9.

¹¹ Brief of the government of United Kingdom of Great Britain and Northern Ireland as amicus curiae at 4 & 5.

Letters of Request and to "improve mutual judicial cooperation in civil or commercial matters". (Pet. App. 26a). The preamble does not state that one must use Convention procedures to obtain evidence located abroad. Similarly, Article I specifically states that "In civil or commercial matters a judicial authority of a Contracting State *may*, in accordance with the provisions of the law of that State, request the competent authority of another Contracting States by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." (emphasis added). (Pet. App. 26a). Unlike the Hague Service Convention,¹² which expressly provides that it is exclusive, the Hague Evidence Convention contains no express provision for exclusivity. *Anschuetz*, 754 F.2d at 615, n.30. In fact, alternative methods ostensibly are preserved by Article 27 of the Convention, which states: "The provisions of the present Convention shall not prevent a Contracting State from . . . (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." (Pet. App. 35a).¹³

The history of the United States' adoption of the Convention further confirms the permissive, supplemental nature of the Hague Convention. The Convention was drafted to expand and liberalize the previously available avenues for discovery, not to constrict them or limit the

¹² Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, reprinted in VII Martindale-Hubbell Law Directory, Part VII p. 1 (1986).

¹³ See *Anschuetz*, 754 F.2d at 608; *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1228 (E.D. Pa. 1983); *Krishna*, 105 F.R.D. at 448; and *Graco*, 101 F.R.D. at 521-22.

jurisdiction of the courts of the signatory states. *Krishna*, 105 F.R.D. at 445.¹⁴ Phillip W. Amram, member of the United States delegation to the Convention and the rapporteur of the Convention makes it clear that the Convention:

“ . . . makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give the United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants.”¹⁵

Indeed, the delegation to the Convention emphasized that the Convention would require no significant change in United States rules and procedures. *1969 U.S. Delegation Report* at 820.

In interpreting the language of the treaty itself and its history, it is clear that it was never intended to apply exclusively to the discovery sought by Plaintiffs in this case.

¹⁴ See *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law*, reprinted in 8 Int'l Legal Materials, 785, 807-15 (1969); Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 652-54 (1969). Even today, the question of exclusivity remains an issue with the experts representing the States which are now parties to the Convention. *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 24 Int'l Legal Materials 1668, 1676 n.3 (1985).

¹⁵ Amram, 55 A.B.A.J. at 655.

C. The Federal Rules of Civil Procedure Are Not Supplanted By the Hague Evidence Convention.

The Federal Rules and the Hague Convention are essentially on equal footing. Both are entitled to be recognized as part of the supreme law of the land. *Anschuetz*, 754 F.2d at 608 n. 12; *Laker Airways*, 103 F.R.D. at 49.

The Convention was not intended to shield foreign litigants from the normal burdens of litigation in American courts. If the Hague Convention supplanted the Federal Rules of Civil Procedure, foreign litigants would have an extraordinary advantage in American courts. *SNIAS*, 788 F.2d at 1411.¹⁶ Petitioners' contention that such a conclusion will undermine the Hague Convention's stated purpose and render the entire Convention meaningless is not well founded. The Hague Evidence Convention and the Federal Rules of Civil Procedure, applicable to parties over which a federal court has *in personam* jurisdiction, may be both construed so as to avoid conflict and to be compatible with each other. The Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign non-parties who are not subject to an American court's juris-

¹⁶ “Whether the Convention was intended to limit intrusive unauthorized discovery proceedings by prohibiting them, or merely by offering an attractive alternative, the Court cannot agree that the Convention was intended to protect foreign parties, over whom an American court properly has jurisdiction, from the normal range of pre-trial discovery available under the Federal Rules of Civil Procedure.” *Graco*, 101 F.R.D. at 521. *Graco* has been cited by numerous courts, including: *Messerschmitt*, 757 F.2d at 731, n.5; *Anschuetz*, 754 F.2d at 611; *Lowrance*, 107 F.R.D. at 388; *Work*, 106 F.R.D. 45 at 50; *Krishna*, 105 F.R.D. at 448; *Slauenwhite*, 104 F.R.D. at 618.

diction and compulsory powers. (Pet. App. 6a); *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 125 (8th Cir. 1986) cert. granted 54 U.S.L.W. 3809 (U.S. June 9, 1986).¹⁷ Were the Convention viewed as the exclusive procedure for foreign discovery of foreign parties, these parties would be given an unfair evidentiary advantage over their American opponents. The foreign party would have full discovery of his opponent under the Federal Rules of Civil Procedure, while the American litigant would be forced to rely upon the limited Hague Convention procedures. Should the foreign government prove unwilling to carry out discovery requests under the Convention, the American litigant would be unable to prepare its case against the fully prepared foreign party. *Messerschmitt*, 757 F.2d at 731.¹⁸ It seems inconceivable

¹⁷ Citing *Graco*, 101 F.R.D. at 520. The Convention would apply to depositions of non-party witnesses willing to be deposed at home, but unwilling to travel to the country in which the litigation is proceeding. It also would apply where an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities' and the witnesses' state use their authority to compel the giving of evidence. See e.g. *Work*, 106 F.R.D. at 48; *McLaughlin v. Fellows Gear Shaper Company*, 102 F.R.D. 956, 958 (E.D. Penn. 1984).

¹⁸ The *Anschuetz* court stated that:

"*Anschuetz*' interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as *Anschuetz* seeks discovery, it would be permitted the full range of free discovery provided by the Federal Rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a

(Continued on following page)

that the United States intended this result in ratifying the treaty. In fact, Philip Amram, a member of the United States delegation to the 1968 Session of the Convention, stated that the Convention would affect "[n]o major changes in United States procedure and requires no major changes in United States legislation or rules." Amram, 55 A.B.A.J. at 655.

Traditionally, United States courts have had the power to require that a party or witness, over whom they have jurisdiction, comply with a discovery request. *Compagnie*, 105 F.R.D. at 27 (citations omitted). Extraterritorial discovery has been standard for some time, and there is no evidence that the United States, in agreeing to comply with the Hague Convention, intended to abandon this practice. *Id.* at 28.¹⁹ Since American courts have the power to require a foreign party subject to its *in personam* jurisdiction to respond to legitimate discovery requests under the Federal Rules of Civil Procedure, the Hague Convention cannot be construed to be the exclusive means for obtaining discovery from a foreign party.

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result directly antithetical to the expressed goals of the Federal Rules and the Hague Convention which aimed to encourage the flow of information among adversaries."

754 F.2d at 606. See e.g. *Lowrance*, 107 F.R.D. at 387; *Krishna*, 105 F.R.D. at 446; *Compagnie*, 105 F.R.D. at 28; and *Adidas (Canada) Ltd. v. S.S. Seatrain Bennington*, No. 80 Civ. 1922, Slip Op. at 6 (S.D.N.Y. May 30, 1984).

¹⁹ See e.g. *Anschuetz*, 754 F.2d at 613; *Work*, 106 F.R.D. at 52; *Krishna*, 105 F.R.D. at 438; and *Laker Airways*, 103 F.R.D. at 48.

D. Petitioners Have Recognized that the Hague Evidence Convention is Not Exclusive.

The Petitioners themselves have suggested that the Hague Convention is not exclusive.²⁰ Early in the discovery process of this case, Petitioners' counsel indicated to Plaintiffs' counsel that the Convention could be waived.²¹ Petitioners further recognized the non-exclusivity of the Hague Convention in complying with some of Plaintiffs' discovery requests made under the Federal Rules of Civil Procedure.²² France also recognized that the Convention procedures were not exclusive when it enacted its "Blocking Statute."²³

²⁰ "No one denies the jurisdiction of the district court to order petitioners, at parties to the action before it, to give discovery of evidence in France." Pet. Reply Brief, p. 5. " * * * Conventions' procedures must be used before resort to domestic laws considered". Pet. Brief, p. 23.

²¹ Petitioners' counsel, in a letter dated October 18, 1983 to Plaintiffs' counsel, suggested that Plaintiffs' counsel indicate whether he preferred to proceed under the Hague Convention, or would accept Petitioners' good-faith efforts to comply with Plaintiffs' discovery requests on an informal basis. It was indicated that if Plaintiffs preferred the informal route, Petitioners' counsel would contact his client to recommend that the Convention be waived, but did note, that he did not have authority to waive the Convention, but merely stated that he would recommend to his client that it do so.

²² In December 1983, Petitioners furnished to Plaintiffs copies of the Type Certificate and type certificate data for the aircraft. No reference was made to the Hague Convention at this time. In May 1984, Petitioners supplied a copy of the flight manual. In October 1985, long after filing their Motion for Protective Order, Petitioners responded to Plaintiffs' request for admissions and further indicated that they would be supplemented.

²³ *Graco*, 101 F.R.D. at 519; Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 586 n.4, 596-98 (1981).

The discovery sought by Plaintiffs is not governed by the Hague Convention in that such discovery will take place in the United States, not France. The Hague Convention is not exclusive, does not supplant the Federal Rules of Civil Procedure, and its application is not mandatory nor necessary in this case.

III.

APPLICATION OF THE PRINCIPLES OF INTERNATIONAL COMITY DO NOT REQUIRE THE HAGUE CONVENTION TO BE THE AVENUE OF FIRST CHOICE IN THIS CASE

A. A Comity Analysis is Unnecessary.

It has been held that no analysis of international comity need be made when all discovery sought is to occur in this country. *Lowrance*, 107 F.R.D. at 389.²⁴ Where the American federal district court has *in personam* jurisdiction over a foreign national, corporate entity or individual, it is not required to mandate that the parties follow the Hague Evidence Convention procedures for pre-trial discovery, nor is it required to exercise judicial restraint and defer to international comity where the utilization of the Hague Evidence Convention procedures would lead to an inordinate delay. *Work*, 106 F.R.D. at 55-56.

²⁴ As in this case, the *Lowrance* case concerned request for production of documents and interrogatories.

B. Comity, As Applied in this Case, Is the Weighing of France's Interest in Maintaining Control Over Its Judicial System Against the American Interest in Obtaining Full Pre-Trial Discovery.

It is recognized by Plaintiffs that most courts have stated that a district court should consider, as a matter of international comity, whether the parties should be required to proceed under the Hague Convention before discovery is compelled under the Federal Rules of Civil Procedure.²⁵ Comity in this case is the weighing of France's interest in maintaining control over its judicial system against the American interest in obtaining full pre-trial discovery of information relevant to pending litigation in the United States.

"Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

Hilton v. Guyot, 159 U.S. 113, 164-65, 16 S.Ct. 139, 143, 40 L. Ed. 95 (1895).

Petitioners argue that international comity is promoted and the judicial sovereignty of France preserved if the discovery orders against them are voided and Plaintiffs forced to establish their case under French internal

²⁵ See e.g. *SNIAS*, 788 F.2d at 1411; *Messerschmitt*, 757 F.2d at 731; *Anschuetz*, 754 F.2d at 614.

law and procedure via the Hague Convention. In support of their argument, Petitioners have cited the following cases: *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App 3d 840, 176 Cal. Rptr. 874 (1981); and *Pierburg GmbH v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982). These cases require litigants to rely on the Hague Convention as a first resort, reasoning that international comity is promoted thereby. These cases find that the purpose of the Hague Convention was to establish a uniform system for taking of evidence abroad, and that the sovereignty of the nation in whose borders the evidence exists is *per se* violated by deviation from the procedures outlined in the Convention. These courts conclude that litigants are free to return to the U.S. Court for further discovery orders should their first resort in the foreign tribunal prove unsuccessful.

However, the better reasoned jurisprudence addressing the Convention has found that the Convention was not designed to be the exclusive method for taking evidence abroad. There is nothing in the Convention indicating an intent to restrict the jurisdictional power of the federal district courts to enforce the discovery provisions of the Federal Rules of Civil Procedure with regard to all parties, including foreign parties, before the Court. The proper approach, and the one supported by the treaty's United States history, is to interpret the treaty to supplement, rather than to supplant the Federal Rules of Civil Procedure. First resort to the Convention, even under a comity analysis, is not necessary in every case.

C. The Application of the Factors Set Forth in Restatement (Second) of Foreign Relations Law § 40, Do Not Mandate the Application of the Hague Evidence Convention to the Limited Discovery Sought in this Case.

Some courts (including the one below), in balancing the competing interests, have applied the factors set forth in the Restatement (Second) of Foreign Relations Law § 40.²⁶ That section provides:

"Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as:

- (a) vital national interests of each of the states,
- (b) The extent and the nature of the hardship that inconsistent enforcement action would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.'²⁷

²⁶ Pet. App. 9a; *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *United States v. Vetco Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981); *Compagnie*, 105 F.R.D. at 29.

²⁷ *Ibid.*

1) Vital National Interests

France has no vital interests involved in this litigation. While France may have some argument if judicial acts were required to take place on its soil, such is not the case here. Plaintiffs' discovery requests do not require any proceedings to take place in France. Under the Federal Rules of Civil Procedure, discovery of documents located in France need not directly involve French judicial officers. No adverse party will enter on French soil to gather evidence. No oath need be administered on French soil or by a French judicial authority. What is required of Petitioners on French soil, is certain acts preparatory to the giving of evidence. They must select the relevant documents which they wish to reveal to Plaintiffs in the forum state. These acts do not call for French judicial participation.²⁸

On the other hand, the United States has several important interests in this litigation favoring enforcement of the district court's discovery order. The United States courts have an interest in assuring that all litigants proceeding before them are treated equally and fairly. This country has a clear interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation here. *Murphy*, 101 F.R.D. at 363. If a United States national is forced to resort to the Hague Convention rather than the federal discovery rules as to foreign national litigants, the foreign

²⁸ See e.g. *Messerschmitt*, 757 F.2d at 732; *Anschuetz*, 754 F.2d at 611; *Krishna*, 105 F.R.D. at 449; *Slauenwhite*, 104 F.R.D. at 618; *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984); *Adidas, Slip Op.* at 5.

national will have an unfair advantage. "If interpreted as preempting routine interrogatories and document requests, the Convention would really be much more than an agreement on taking evidence abroad, which it purports to be. Instead, the Convention would amount to a major regulation of the overall conduct of the litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation has begun." *Graco*, 101 F.R.D. at 521-22. The interpretation advocated by Petitioners would give an extraordinary and unfair advantage to French litigants before United States courts. "Insofar as the French litigant sought discovery of its United States adversary, it would be permitted the full range of free discovery provided by the Federal Rules. But when the United States adversary sought reciprocal disclosure by the French party, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention." *Adidas*, Slip Op. p. 6.²⁹

The United States has an important interest in discouraging parties before its courts from attempting to avoid compliance with its court's discovery orders. Requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the Federal Rules and the Hague Convention, which aims to encourage the flow of information among adversaries. *Anschuetz*, 754 F.2d at 606.

²⁹ See also *Anschuetz*, 754 F.2d at 606.

The United States has a crucial interest in discouraging delay tactics undertaken by litigants within the jurisdiction of its courts. Requiring a party to seek discovery pursuant to the Hague Convention, particularly where the foreign party is a national of a country like France which has instituted a blatant policy of discouraging and hindering attempts to obtain pre-trial discovery within its borders, will result in nothing but useless delay. *Anschuetz*, 754 F.2d at 612. *Pain v. United Technologies Corp.*, 637 F.2d 775, 788-89 (D.C. Cir. 1980).³⁰

The United States also has a significant interest in protecting its citizens from harmful products and in compensating its citizens from injuries arising from the use of such products. (Pet. App. 23a).

The national interests of France and the United States balance heavily in favor of permitting the district court to exercise its jurisdiction to compel discovery in the United States in this matter.

³⁰ The Hague Convention machinery is quite slow and costly, even when the foreign government agrees to cooperate. *Krishna*, 105 F.R.D. at 450; *Murphy*, 101 F.R.D. at 361. The United States government, through the Securities and Exchange Commission, has first hand experience under the Convention in seeking to secure documents and testimony from third-party witness residing in France. Slow and costly indeed. Brief for United States and S.E.C. as amicus curiae, at 16. There is no reason to believe that French nationals will cooperate in United States pre-trial discovery. See Toms, *French Response to the Extra-territorial Application of the United States Antitrust Laws*, 15 Int'l Law. 585 (1981); National Assembly Report No. 1814, A. Mayoud, Reporter for the Commission on Production and Exchanges (1980).

2) Hardship

The requested discovery does not have to take place in France, and the procedures ordered by the district court are not greatly intrusive or abusive, nor do they infringe upon French sovereignty. Petitioners claim that the use of United States discovery procedures violates the "French Blocking Statute" and, therefore, creates a direct conflict with foreign law raising a very important comity consideration favoring restraint in the extra-territorial application of domestic law. (Pet. Brief, p. 37). This blocking statute (aptly named) obviously is a manifestation of French displeasure with American pre-trial discovery procedures, which are significantly broader than the procedures accepted in other countries. *Graco*, 101 F.R.D. 508; Toms, 15 Int'l Law. at 586. In the Solicitor General's view, objections founded merely on hostility to American law should be approached with some skepticism in any proper comity analysis. (Solicitor General's Amicus Curiae Brief pp. 24-25). The fact that the foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information, does not automatically bar a domestic court from compelling production. *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 112, 78 S.Ct. 1087, 1095, 40 L.Ed. 95 (1958).³¹ The party relying on foreign law has the burden of showing that such law bars production. *Vetco*, 691 F.2d at 1289.

³¹ See e.g. *First National Bank*, 699 F.2d at 345; *Vetco*, 691 F.2d at 1281; *Krishna*, 105 F.R.D. at 447; *Compagnie*, 105 F.R.D. at 29; *Graco*, 101 F.R.D. at 509; and *Soletanche and Rodio, Inc. v. Brown and Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269 (N.D. Ill. 1983).

It appears that the Petitioners could request a waiver from the appropriate Minister, and if the waiver were granted, provide Plaintiffs with the necessary information without fear of punishment. *Soletanche*, 99 F.R.D. at 271. Being nationalized French companies, there is no one in a better position to request and have granted such a waiver. This does not impose too great a burden upon Petitioners. In any event, it appears that the French Blocking Statute has not been strictly enforced. Toms, 15 Int'l Law. at 599 & 605.

On the other hand, the hardship imposed upon Plaintiffs, if subjected to mandatory use of the Hague Convention, will be extreme. At a minimum, Plaintiffs will be required to resort unnecessarily to the cumbersome and time-consuming procedures set forth by the French under the Hague Convention to obtain minimal information. More likely, in light of the French policy against pre-trial discovery, through its adoption of Article 23, Plaintiffs will be required to go through this expensive and time-consuming procedure only to come up empty handed, with a need to ultimately resort to Federal Rules discovery anyway, with possible requests for sanctions and probable appeals—all causing further delay. It has been recognized that serious problems have arisen as a result of the co-existence of blocking statutes and Article 23 reservations. Indeed, the combined effect of a blocking statute and a general, unrestricted reservation under Article 23, may paralyze the Convention and has caused the courts in the United States to not use the Convention. 1985 *Special Commission Report* at 1677. The Special Commission also concluded that the adoption of an unqualified reservation, as permitted by Article 23, would

seem to be excessive and detrimental to the proper operation of the Convention. *Id.* at 1678. It also concluded that the combined effect of a blocking statute and an unqualified reservation under Article 23, when both are adopted by a state, may be to discourage the use by other states of the Hague Convention. *Id.* at 1679. Although the delegates to the June 1978 Special Commission meeting on the operation of the Convention agreed to urge the governments to reconsider their declarations under Article 23 of the Convention, France has not done so. *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 17 Int'l Legal Materials 1417, 1424 (1978). It appears unlikely that France will soon withdraw or limit its reservation prohibiting pre-trial letters of request. Toms, 15 Int'l Law. at 597. See also *National Assembly Report No. 1814*. Foreign litigants bear the burden of demonstrating that such reservations, such as France's declaration under Article 23, do not mean what they say. A foreign nation's insistence on retention of an absolute reservation under Article 23 necessarily raises serious questions about the likely effectiveness of discovery requests directed to it under the Convention. Solicitor General's Brief, pp. 27 & 28. Should this Court impose mandatory application of the Convention upon Plaintiffs, the hardship will fall on Plaintiffs, not Petitioners, and the administration of justice will be frustrated rather than added, as Plaintiffs would be unable to prepare their case against the fully prepared Petitioners.

Of course, in the event that Plaintiffs' efforts under the Hague Convention prove futile, and there is no reason to believe they won't be futile, further resort may be sought from the district court under the Federal Rules of Civil Procedure. As a proper party doing business in this jurisdiction, and the Court having *in personam* jurisdiction, Petitioners remain subject to any discovery orders that might be issued from the district court. *Philadelphia Gear*, 100 F.R.D. at 61. The greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure. *Anschuetz*, 754 F.2d at 613.³² The framers of the Convention could not have had such a result in mind.

3) The extent to which the required conduct is to take place in the territory of the other state.

The district court's order does not require any governmental action in France, any appearance in France of foreign attorneys, or any proceedings in France. It requires only that a party, admittedly subject to the personal jurisdiction of a United States court, produce documents, and to respond to request for admissions and answers to interrogatories in the United States. *Messerschmitt*, 757 F.2d at 732. Such minimal actions are not judicial acts requiring assistance of the Hague Convention.

³² See also *Graco*, 101 F.R.D. at 523.

4) Nationality.

Petitioners are French nationalized companies.

5) Enforcement and compliance.

This portion of the Restatement § 40 balancing test asks whether a competing regulatory scheme actually regulates the conduct in question, or whether it merely is on the books or is otherwise ineffective. In the context of the present dispute, the court must inquire whether France actually enforces the Blocking Statute. This inquiry is relevant not only to determine whether the Blocking Statute actually regulates conduct, but also to assess the likelihood that Petitioners will be punished for violating the Blocking Statute. *Graco*, 101 F.R.D. 513 & 514. As stated previously, it appears that the Blocking Statute has not been strictly enforced in France, may be waived, and Petitioners are in a favorable position to obtain a waiver.³³

In analyzing the balancing test, other courts also have recognized that the importance of the requested discovery should be considered. *Graco*, 101 F.R.D. at 515. See *Vetco*, 691 F.2d at 1290. There can be no question that discovery is an important aspect to any products liability case such as this one. Obtaining discovery directly from manufacturers is often crucial to the successful prosecution of a defective product case.

Even if international comity factors are called into play in this case, they do not justify requiring Plaintiffs to proceed pursuant to the Hague Convention to obtain

³³ Toms, 15 Int'l Law. at 599 & 605.

discovery from a party over whom the district court has personal jurisdiction. Petitioners purposely availed themselves of the privileges of conducting business within the United States. The aircraft which Petitioners manufactured was advertised in the United States in American aviation publications, sold in the United States, and presumably Petitioners profited from such activity. Petitioners obtained a Type Certificate from the Federal Aviation Administration so that the aircraft could be deemed airworthy in the United States. Petitioners are now, in fact, "Plaintiffs" in this litigation.³⁴ Petitioners have indeed made use of the Federal Rules of Civil Procedure to obtain discovery from Plaintiffs. Petitioners have propounded interrogatories to Plaintiffs, have participated in the deposition of Plaintiff John George, have requested and received various documents, and have had their expert examine some of the aircraft wreckage which is currently stored in Plaintiffs' counsels' office. To allow the Petitioners the full use and benefits of the Federal Rules of Civil Procedure, and at the same time restrict Plaintiffs to an exercise in futility under the Hague Convention, under which France has explicitly declared that it will not execute Letters of Request with regard to American pre-trial discovery, is unjust. Under the circumstances of this case, an abstract claim of "judicial sovereignty" cannot equate to a right—indeed, it would be an extraordinary privilege—to have all of the benefits of the access to American markets, yet to be free from the burdens that American judicial procedures generally impose.

³⁴ Petitioners filed their cross-claim on August 2, 1985, against the owner of the aircraft and the two pilots.

CONCLUSION

The Hague Evidence Convention is not applicable to the discovery at issue in this case, as the discovery will "take place" in the United States, not France. The French Blocking Statute does not require this Court to consider a comity analysis to determine if the Hague Convention should be applied. Even if this Court were to apply a comity analysis to the facts of this case, it should conclude that Plaintiffs' discovery is governed by the Federal Rules of Civil Procedure and not the Hague Convention. Accordingly, the judgment of the Court of Appeals should be upheld.

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